IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of Writs of Certiorari and Quo Warranto under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 405/2018

1. Dr. A.M.N. Chaminda,
   President,
   Kelaniya University Teachers' Association,
   University of Kelaniya.

2. Prof. Ven. Nedalagamuwe
   Dhammadinna Thero,
   University of Kelaniya.

3. Dr. Sarath Vitharana,
   University of Kelaniya.

4. Prof. H.H. Sumathipala,
   University of Kelaniya.

PETITIONERS

Vs.

1. University of Kelaniya.

2. Prof. D.M. Semasinghe,
   Vice Chancellor.

3. Prof. Lakshman Senevirathne,
   Deputy Vice- Chancellor.

4. Prof. J.M.D. Ariyaratne,
   Dean, Faculty of Graduate Studies.

5. Prof. P.S. Wijesinghe,
   Dean, Faculty of Medicine.

6. Dr. P.G. Wijayarathna,
   Dean, Faculty of Computing & Technology.

7. Prof. B.M. Jayawardhana,
   Dean, Faculty of Science.

8. Dr. P.N.D. Fernando,
   Dean, Faculty of Commerce & Management Studies.

9. Prof. R.M. Patrick Rathnayake,
   Dean, Faculty of Humanities.

10. Prof. S.T.B. Amunugama,
11. Prof. D.M.A. Dissanayake,
12. Ven. Ambanwala Gnanaloka Thero,
13. Mr. W.M.A.S. Iddawela,
14. Mr. Asela Kulugampitiya,
15. Prof. S.P. Lamabadusuriya,
16. Mr. E.P. Donnet Nandasinghe,
17. Mr. Prithi Perera,
18. Mr. P.M.P.Perera,
19. Mr. Nishan Premathiratne,
20. Vidyanidhi Prof. W.M.T.B. Wanninayaka,
21. Mr. H.M.N. Warakaulle,
22. Prof. N.A.K.P.J. Seneviratne,
23. Prof. P.M.C. Thilakeratne.

24. Prof. A.H.M.H. Abayarathne,
    Dean, Faculty of Social Science.

25. Prof. Mrs. Udha Hettige,
    Department of Archaeology.

26. Mrs. H.H.N.S. Hewawasam,
    Head of the Department of History

The 2nd to 26th Respondents are of,
The University of Kelaniya.
Dalugama, Kelaniya.

27. Akuressa Simanneru Pathiranage,
Saman Priyantha Sanjeewa,
No. 478, Sir D.B. Jayathilaka Mawatha,
Pilapitiya, Kelaniya.

28. Mr. R.M.G.W. Dissanayake,
The University of Kelaniya.

29. Mr. H.M.S.B. Herath,
The University of Kelaniya.

30. Mr. E.W.A.H.C. Gunasinghe,
The University of Kelaniya.

31. Mr. W.M. Karunaratne,
The Registrar and Secretary to the Council
The University of Kelaniya.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Rasika Dissanayake with Dimuthu Cooray and Thusitha Wijayakone for the Petitioners

Nerin Pulle, Senior Deputy Solicitor General with Ms. Kanishka De Silva Balapatabendi, Senior State Counsel for the 1st – 23rd, 25th and 26th Respondents

Pulasthi Hewamanne for the 24th Respondent

Uditha Egalahewa, P.C., with Damitha Karunarathne and Vishva Vimukthi for the 27th Respondent

Supported on: 18th September 2019

Written Submissions: Tendered on behalf of the Petitioners on 4th October 2019

Tendered on behalf of the 1st – 23rd, 25th and 26th Respondents on 4th October 2019

Tendered on behalf of the 24th Respondent on 4th October 2019

Tendered on behalf of the 27th Respondent on 1st October 2019

Decided on: 7th August 2020

Arjuna Obeyesekere, J

The Petitioners have filed this application, seeking *inter alia* a Writ of Certiorari to quash the decision of the 1st Respondent, the University of Kelaniya, to appoint the 27th Respondent as a Senior Lecturer (Grade II), Department of History, Faculty of Social Sciences, University of Kelaniya. The letter of appointment dated 14th November 2018 issued to the 27th Respondent has been annexed to the petition, marked '**P8**',

The facts of this matter very briefly are as follows.

On or around 26th January 2018, the 1st Respondent had called for applications for the post of Probationary Lecturer and Senior Lecturer (Grade II) in the Department of History, Faculty of Social Sciences of the 1st Respondent.

The following facts are not in dispute:

(a) That the 27th – 29th Respondents, and Ms. N. D. Kekulawala had applied for the post of Senior Lecturer (Grade II);

(b) That the above candidates were interviewed for the said post on 27th August 2018 by a panel comprising of the 24th – 26th Respondents;

(c) That the interview panel selected the 28th and 29th Respondents but did not select the 27th Respondent;

(d) That the 27th Respondent had also applied for the post of Probationary Lecturer, but was not selected for the said post, either.

Aggrieved by the said decision not to appoint him to the post of Senior Lecturer (Grade II), the 27th Respondent had filed Fundamental Rights Application No. 294/2018, seeking *inter alia* a declaration that his fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution had been infringed, and a directive that he be appointed to the post of Senior Lecturer (Grade II) with effect from 17th September 2018.[1]

According to the journal entry of 25th October 2018 of the said fundamental rights application, produced by the 27th Respondent together with his Statement of Objections, marked '**27R2**', the learned Counsel for the 1st and 2nd Respondents had informed the Supreme Court on that date that *he has instructions from the 1st and 2nd Respondents that they could accommodate the Petitioner for which purpose Council of the 1st Respondent is to (meet) on 13th November 2018.* On 4th December 2018, the Counsel for the 27th Respondent (i.e. the petitioner in the said application) had informed Court that the 27th Respondent had been appointed to the post of Senior Lecturer (Grade II) by '**P8**', and that he had assumed duties in the said post. The Supreme Court, having noted that *this is an administrative matter where relief has been obtained* had allowed the application of the 27th Respondent to terminate proceedings.

This application had been filed thereafter on 18th December 2018 seeking to quash the letter of appointment '**P8**' issued to the 27th Respondent.

When this matter came up for support, the learned President's Counsel for the 27th Respondent, and the learned Senior Deputy Solicitor General for the 1st Respondent raised the following preliminary objections:

[1] A copy of the petition has been marked 'P5'.

(a) The appointment of the 27th Respondent was carried out pursuant to a settlement arrived in the said fundamental rights application, and therefore the Petitioners in this application cannot re-agitate the same matter in this application;

(b) The Petitioners lack standing to have and maintain this application.

This Court shall now deal with the first preliminary objection.

Although the facts of this application do not come within the strict definition of the doctrine of *res judicata*, the principles on which the said doctrine is based upon would still be applicable. As pointed out by Spencer, Bower and Turner in **The Doctrine of Res Judicata**[2] the doctrine of *res judicata* is based on two principles. The first is the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions. This is a matter of public policy[3]and involves considerations such as the avoidance of duplicative litigation, potentially inconsistent results and inconclusive proceedings. The second is the right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may weigh down judicially declared right and innocence. This is a matter of private justice.[4]

The following passage from **Law of Estoppel and Res Judicata** by M. Monir and A.C.Moitra[5] confirms the underlying reasons for this doctrine:

> "*The principle of res judicata is founded on consideration of public policy. It is in the interest of public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction; and it is also in the public interest that individuals should not be vexed twice for the same kind of litigation*."

[2] 2nd Edition at page 10
[3] Expressed in the maxim *interest (or expedit) reipublicae ut sit finis litium*
[4] Expressed in the maxim *nemo debet bis vexari pro una et eadem causa*
[5] 4th Edition, at page 236

In **New Brunswick Rail Co. vs British and French Trust Corporation Ltd**[6] the House of Lords made the following observation:

> "*The doctrine of estoppel (per rem judicatum) is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same to be litigated afresh between the same parties or persons claiming under them*."

There is no doubt that the issue before this Court arises from the settlement that was entered into in the said application before the Supreme Court, and that the proceedings were terminated before the Supreme Court in view of the said settlement. In other words, the 27th Respondent's complaint to the Supreme Court was not adjudicated by the Supreme Court in view of the said settlement. Assuming this Court entertains this application, and thereafter determines this application against the 27th Respondent, the effect of such a determination would be to the detriment of the 27th Respondent, in that he has been deprived of an opportunity of placing his grievance before the Supreme Court.

On the other hand, if the Petitioners in this application were genuinely aggrieved by the appointment of the 27th Respondent, they could have intervened in the said fundamental rights application, and placed their grievance before the Supreme Court, for a composite determination of the issue. As noted earlier, the discussion of a settlement had taken place as far back as 25th October 2018, and the Council of the 1st Respondent had met on 13th November 2018. These facts could not have been unknown to the Petitioners who were members of the Staff of the 1st Respondent, and therefore, the Petitioners had ample time to intervene in the aforementioned application before the Supreme Court. No explanation has however been given by the Petitioners as to why they did not agitate their grievance before the Supreme Court.

[6] 1939 AC 1

It is important that this Court does not allow multiple proceedings before different fora on the same or a related issue. It is equally important that this Court does not allow forum shopping by litigants. A discussion on this matter would not be complete without considering the power of this Court to strike down applications of this nature and prevent an abuse of the process of Court. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.[7] One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to re-litigate a claim which the court has already determined.[8] The following passage from **Walton vs Gardiner**[9] sums up the above position:

> "*[Abuse of process] extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness… Proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings.*"

Although there has not been a determination by a Court of law, what the Petitioners are seeking to do is a re-litigation of a dispute that was before the Supreme Court, resulting in vexatious multiplication of suits. This Court takes serious note of the conduct of the Petitioners and holds that the Petitioners have not come before this Court with clean hands.

Taking into consideration all of the above matters, this Court upholds the first preliminary objection raised by the learned President's Counsel and the learned Senior

[7] Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A
[8] See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All ER 990 (C.A.).
[9] (1993) 177 CLR 378, 395, HCA.

Deputy Solicitor General, and is of the view that this application is liable to be dismissed on this ground alone.

The second objection relates to the standing of the Petitioners to bring this action. While the 1st and 3rd Petitioners are serving as Senior Lecturers (Grade I) at the 1st Respondent University, the 2nd and 4th Respondents are Professors at the 1st Respondent University. However, none of the Petitioners are attached to the Department of History or to the Faculty of Social Sciences of the 1st Respondent, which is the Department and Faculty, respectively, to which the 27th Respondent has been appointed. The Respondents allege that the Petitioners have not invoked the jurisdiction of this Court in the public interest, nor have the Petitioners demonstrated the manner in which their rights have been affected by the said appointment. It is in this background that the Respondents have submitted that the Petitioners are a group of busybodies who have initiated this application out of malice, and to support the 24th Respondent, who was a member of the Interview Panel. While there has been a significant relaxation of the rules relating to standing over the years, and the Courts are inclined to look at irregularities said to have been committed by public authorities, it is important that a petitioner demonstrate the manner in which his or her rights have been affected by the impugned decision. It is equally important that a litigant comes before this Court with clean hands and not to achieve a collateral purpose. Be that as it may, the necessity for this Court to consider the second preliminary objection does not arise in view of the conclusion reached on the first objection.

For the reasons set out in this Order, this Court is of the view that this is not a fit case in which notices should be issued on the Respondents. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal